

AMENDED IN SENATE MAY 27, 2011

AMENDED IN SENATE MARCH 23, 2011

**SENATE BILL**

**No. 459**

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**Introduced by Senator Corbett**

February 16, 2011

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An act to amend Sections 1174.5 and 1175 of, and to add Sections 226.8, 1174.1, and 2753 to, the Labor Code, and to add Section 9620 to the Unemployment Insurance Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 459, as amended, Corbett. Employment: independent contractors.

(1) Existing law prescribes comprehensive requirements relating to minimum wages, overtime compensation, and standards for working conditions for the protection of employees applicable to an employment relationship.

This bill would prohibit willful misclassification, as defined, of ~~employees~~ *individuals* as independent contractors. The bill would authorize the Labor and Workforce Development Agency to assess specified civil penalties from persons or employers violating the bill.

This bill would provide that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. This bill would exempt from the provisions regarding joint and several liability a person who provides advice to his or her employer or an attorney who provides legal advice in the course of practicing law.

(2) Existing law requires every person employing labor in this state to furnish reports or information to the Industrial Welfare Commission.

Existing law requires that person to permit a member of the commission or employees of the Division of Labor Standards Enforcement within the Department of Industrial Relations free access to the place of business or employment of that person to secure information or make an authorized investigation. That person is required to keep a record showing the names and addresses of all employees employed, and keep, for a period of not less than 2 years, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to employees employed at the respective plants and establishments. Under existing law, a person who willfully fails to maintain these records or permit a member of the commission or employees of the division to inspect records is subject to a civil penalty of \$500. A person who neglects or refuses to furnish the information requested by the commission, refuses access to his or her place of business, hinders the commission or employees of the division, or fails to keep any records required by this provision is guilty of a misdemeanor.

This bill would require a person employing labor in this state to provide to an individual ~~hired~~ *retained* as an independent contractor, when that individual is ~~hired~~ *retained*, a form that includes a notice that the individual has been ~~hired~~ *retained* as an independent contractor, a statement explaining the impact that the individual's status as an independent contractor has on his or her tax obligations and eligibility for labor and employment protections, and a notice of the individual's ability to seek advice from the Employment Development Department or the Labor Commissioner as to whether the individual is properly classified as an independent contractor. The bill would require the person employing labor in this state to maintain, for a period of no less than 2 years, records of the independent contractors ~~hired~~ *retained* by that person which include specified information concerning each independent contractor, and to make these records available for inspection by a member of the commission or an employee of the Department of Industrial Relations or the Employment Development Department. The bill would provide that a person who willfully fails to maintain these records or permit a member of the commission or employees of those departments to inspect those records is subject to a civil penalty of \$500. The bill would also provide that a person who neglects or refuses to furnish information requested under this provision, refuses access to his or her place of business, hinders the commission or employees of those departments, or fails to keep any records required

by this provision is guilty of a misdemeanor. By expanding the definition of an existing crime, the bill would impose a state-mandated local program.

(3) Under existing law, the Employment Development Department has the powers and duties necessary to administer the reporting, collection, refunding to the employer, and enforcement of taxes required to be withheld by employers.

The bill would additionally require the Employment Development Department to develop a form that includes a notice to an independent contractor regarding the impact that status as an independent contractor has on the individual's tax obligations and eligibility for labor and employment protections, and a notice that the independent contractor may seek advice from the Employment Development Department or Labor Commissioner as to whether the individual is properly classified as an independent contractor. The bill would require the Employment Development Department to process a request for advice by an individual regarding whether that individual is an independent contractor or employee, and to take all steps reasonably necessary to carry out the duties described in these provisions.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 226.8 is added to the Labor Code, to  
2 read:  
3 226.8. (a) It is unlawful for any person or employer to engage  
4 in any of the following activities:  
5 (1) Willful misclassification of an ~~employee~~ *individual* as an  
6 independent contractor.  
7 (2) Charging an ~~employee~~ *individual* who has been willfully  
8 misclassified as an independent contractor a fee, or making any  
9 deductions from compensation, for any purpose, including for  
10 goods, materials, space rental, services, government licenses,  
11 repairs, equipment maintenance, or fines arising from the

1 employee's *individual's* employment where the employer would  
2 have been in violation of the law if the ~~employee~~ *individual* had  
3 not been misclassified.

4 (b) If the Labor and Workforce Development Agency, or any  
5 of its departments, divisions, commissions, boards, or agencies,  
6 or a court finds that person has engaged in any of the enumerated  
7 violations of subdivision (a), a civil penalty of not less than five  
8 thousand dollars (\$5,000) and not more than fifteen thousand  
9 dollars (\$15,000) shall be assessed against the person for each  
10 violation, in addition to any other penalties or fines permitted by  
11 law.

12 (c) If the Labor and Workforce Development Agency, or any  
13 of its departments, divisions, commissions, boards, or agencies,  
14 or a court finds that person has engaged in any of the enumerated  
15 violations of this section and there is evidence that the person has  
16 engaged in or is engaging in a pattern or practice of these behaviors,  
17 a civil penalty of not less than ten thousand dollars (\$10,000) and  
18 not more than twenty-five thousand dollars (\$25,000) shall be  
19 assessed against the person for each violation, in addition to any  
20 other penalties or fines permitted by law.

21 (d) For purposes of this section, "willful" means voluntary and  
22 intentional.

23 (e) Nothing in this section is intended to limit any rights or  
24 remedies otherwise available at law.

25 SEC. 2. Section 1174.1 is added to the Labor Code, to read:

26 1174.1. (a) A person employing labor in this state shall provide  
27 to an individual ~~hired~~ *retained* as an independent contractor, when  
28 the individual is ~~hired~~ *retained*, a form developed by the  
29 Employment Development Department that includes all of the  
30 following:

31 (1) A notice that the individual has been ~~hired~~ *retained* as an  
32 independent contractor.

33 (2) The factors the Employment Development Department uses  
34 to determine whether ~~a person~~ *an individual* is an employee or an  
35 independent contractor.

36 (3) A statement explaining the impact that the individual's status  
37 as an independent contractor has on his or her tax obligations and  
38 his or her eligibility for labor and employment protections.

39 (4) A notice of the individual's ability to seek advice from the  
40 Employment Development Department or the Labor Commissioner

1 as to whether that individual is properly classified as an  
2 independent contractor. The notice shall provide the telephone  
3 number for both the Employment Development Department and  
4 the Labor Commissioner.

5 (b) (1) A person employing labor in this state shall maintain,  
6 for not less than two years, records of all independent contractors  
7 ~~hired~~ *retained* by that person. The records shall include the name,  
8 address, social security number, and, if applicable, federal tax  
9 identification number of each independent contractor.

10 (2) A person employing labor in this state shall make the records  
11 described in paragraph (1) available, upon request, for inspection  
12 by a member of the commission or an employee of the Department  
13 of Industrial Relations or the Employment Development  
14 Department.

15 SEC. 3. Section 1174.5 of the Labor Code is amended to read:

16 1174.5. A person employing labor who willfully fails to  
17 maintain, in an accurate and complete fashion, the records required  
18 by subdivision (c) or (d) of Section 1174 or subdivision (b) of  
19 Section 1174.1, or to allow a member of the commission or  
20 employees of the Division of Labor Standards Enforcement to  
21 inspect records pursuant to subdivision (b) of Section 1174 or a  
22 member of the commission or employees of the Department of  
23 Industrial Relations or the Employment Development Department  
24 to inspect records pursuant to subdivision (b) of Section 1174.1,  
25 shall be subject to a civil penalty of five hundred dollars (\$500).

26 SEC. 4. Section 1175 of the Labor Code is amended to read:

27 1175. A person, or officer or agent thereof, is guilty of a  
28 misdemeanor who does any of the following:

29 (a) Neglects or refuses to furnish information requested pursuant  
30 to Section 1174 or 1174.1.

31 (b) Refuses access to his or her place of business or employment  
32 to any member of the commission or employee of the Department  
33 of Industrial Relations or *the* Employment Development  
34 Department when the member or employee is administering or  
35 enforcing this chapter.

36 (c) Hinders that member or employee from securing information  
37 authorized by Section 1174 or 1174.1.

38 (d) Fails to keep any of the records required by Section 1174  
39 or 1174.1.

40 SEC. 5. Section 2753 is added to the Labor Code, to read:

1     2753. (a) A person who, for money or other valuable  
2     consideration, knowingly advises an employer to treat an individual  
3     as an independent contractor to avoid employee status for that  
4     individual shall be jointly and severally liable with the employer  
5     if the individual is found not to be an independent contractor.

6     (b) This section does not apply to the following persons:

7     (1) A person who provides advice to his or her employer.

8     (2) An attorney authorized to practice law in California or  
9     another United States jurisdiction who provides legal advice in  
10    the course of the practice of law.

11    SEC. 6. Section 9620 is added to the Unemployment Insurance  
12    Code, to read:

13    9620. The Employment Development Department also has the  
14    following power and duties:

15    (a) To develop the form described in subdivision (a) of Section  
16    1174.1 of the Labor Code.

17    (b) To process a request for advice by an individual as to  
18    whether that individual is an independent contractor or employee.

19    (c) To take all steps reasonably necessary to carry out the duties  
20    described in Section 1174.1 of the Labor Code.

21    SEC. 7. No reimbursement is required by this act pursuant to  
22    Section 6 of Article XIII B of the California Constitution because  
23    the only costs that may be incurred by a local agency or school  
24    district will be incurred because this act creates a new crime or  
25    infraction, eliminates a crime or infraction, or changes the penalty  
26    for a crime or infraction, within the meaning of Section 17556 of  
27    the Government Code, or changes the definition of a crime within  
28    the meaning of Section 6 of Article XIII B of the California  
29    Constitution.